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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~865~~ 27

GLADYS BODDIE, ET AL
Appellants,

v.

THE STATE OF CONNECTICUT, ET AL
Appellees.

On Appeal from the United States District Court Of The District of Connecticut

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BRIEF FOR APPELLEES

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In the

Supreme Court of the United States

October Term, 1969

No. 265

GLADYS BODDIE, ET AL
Appellants,

v.

THE STATE OF CONNECTICUT, ET AL
Appellees.

On Appeal from the United States District Court
Of The District of Connecticut

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellants are welfare recipients who wish to divorce their husbands.* To prosecute a divorce case in Connecticut one must pay a Superior Court entry fee of forty-five dollars, after having process served by a sheriff at an average cost of fifteen dollars. If newspaper publication is necessary, the aggregate expense could exceed one hundred dollars. Appellants claim they cannot afford these costs.

Appellants attempted prior to service to file divorce complaints in the Superior Court of New Haven, Connecticut on

*Since this case is being heard on appeal from the granting of a motion to dismiss, the following allegations of fact from the Complaint are presumed to be correct.

March 13, 1968 (A. 8-10). In lieu of the required fees, appellants attached financial affidavits (A. 11-28) with a request that the fees be waived and that the court effect service.

On March 14, 1968 Court Clerk Edward Horwitz returned all the papers without filing because they were not accompanied by the statutory fees. On April 2, 1968 Superior Court Judge Joseph S. Longo refused to hear Appellants' motion to waive costs and effect service of process because he had no statutory authority to grant such relief. On the same day, Connecticut Court Administrator, Justice John P. Cotter took the same position.

Appellants then brought a civil rights action in the United States District Court for the District of Connecticut where they requested declaratory and injunctive relief from a three-judge court. Appellants claimed that the Connecticut entry fee statute was unconstitutional as it applied to them and asked the court to order Appellees to accept divorce papers without the payment of entry fees and to effect service of process.

Appellees filed a motion to dismiss which the court granted on July 17, 1968 because it felt a legislature should provide the requested relief. Appellants took an appeal to this court.

SUMMARY OF ARGUMENT

Appellants have requested this court to write an in forma pauperis statute for the State of Connecticut. But, essential to our democracy is a tripartite system of government where no branch interferes with the activities of another. The Connecticut Legislature has the exclusive responsibility of regulating the fee structure for Connecticut courts. The legislature is best equipped to answer questions about socio-economic factors. The information so derived must neces-

sarily support any effective social legislation. Connecticut has begun the task. Even today it is experimenting with innovative concepts such as a legal services demonstration project to aid in selecting the best way to provide legal services for the poor.

Appellants are not now incarcerated. Conn. Gen. Stat. Sec. 52-259 does not intentionally discriminate. A state's forbearance from unintentional discrimination has never been required by this court, except in cases involving the personal liberty of an accused. This Griffin Doctrine should not be extended to include divorce since divorce does not have sufficient weight on the scale of justice. In addition, the Griffin Doctrine should be limited to cases where the state is a participating adversary.

In the last reported year, one and one-half million dollars were received by the Connecticut courts as entry fees. At least ten per cent of the judicial budget was paid by those who directly benefited from the use of the courts — hardly a unique concept. The imposition of entry fees reduces the amount of frivolous litigation. Therefore, these statutory fees are reasonably related to legitimate state interests. No other standard is applicable.

There is no inherent right to avoid payment of court costs for civil litigation. On its own initiative, a Connecticut court cannot waive payment of these fees — a waiver can only be achieved by statute. Even in jurisdictions with statutory in forma pauperis procedures, one proceeds as a matter of privilege. Appellants request not only that this privilege be converted to a constitutional right but also that such right must include arrangements for the payment of auxiliary expenses. The proposition has neither precedent nor merit.

Divorce is a statutory right which the state is not re-

quired to provide. Due process can only protect constitutionally guaranteed rights.

The court should affirm the decision of the District Court which granted appellee's motion to dismiss.

I.

REGULATION OF ENTRY FEES FOR THE CONNECTICUT SUPERIOR COURT IS WITHIN THE EXCLUSIVE DOMAIN OF THE CONNECTICUT LEGISLATURE.

A. Courts cannot overturn legislation merely because it is harsh, unwise, or they would have done it another way.

Appellants have requested this court to discard the system of court procedures enacted by the Connecticut legislature and to replace it with a court made alternate. ". . . (3) Enter a permanent injunction against defendants requiring them to:

(a) Accept for filing, without payment of fees and costs, the papers attached as Exhibit "A";

(b) Permit the named plaintiffs to proceed with their divorce actions without payment of fees and costs;

(c) Effect all necessary service and notice incident to the divorce actions without payment of fees and costs by the named plaintiffs;

(d) Take similar action with respect to future divorce proceedings initiated by other members of the class represented by the named plaintiffs."

Complaint A. 10.

This idea itself seems unconstitutional when one considers that fundamental to our democracy is a tripartite

system of government. Each branch has primary responsibility in mutually exclusive areas and neither the legislative, judicial nor executive functions were conceived to second guess or otherwise undermine the other. *Harper* v. *Virginia Board of Elections,* 383 U.S. 633, 675 (dissenting opinion of Black, J.) More specifically, courts cannot invalidate legislation merely because it is unwise or they would have done it another way.

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' . . ."
>
> *Ferguson* v. *Skrupa,* 372 U.S. 726, 730, 83 S. Ct. 1028, 1031 (1963).

This court cannot acquire a license to legislate merely because a statute has a harsh result. In a case testing the constitutionality of a New York City ordinance requiring foreclosure of tax liens without regard to the amount owed relative to the value of the property, this court said:

> "It is contended that this is a harsh statute. The

New York Court of Appeals took cognizance of this claim and spoke of the 'extreme hardships' resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. . . ."

Nelson v. *City of New York*, 352 U.S. 103, 110, 77 S. Ct. 195, 199 (1956).

B. The development of an in forma pauperis statute necessarily requires the use of skills more appropriate to the legislative function of government.

Practicality as well as precedent should restrain the court from interfering with the legislative process. Appellants essentially ask the court to devise a general in forma pauperis procedure but, to properly develop such a statute, one must consider a myriad of complex economic and social factors. The district court in this case recognized that a legislature was more suited to make such determinations when it said:

"Militating against striking down the present fee legislation by judicial fiat is the extreme difficulty of judicial determination of the course the state should be required to follow. Should the relief agencies provide the fees as part of support to the indigent? From what source should such funds be obtained, and how should they be administered? Should the state courts be required to waive court fees for the indigent? The choice of which method is more fitted to the needs and policy of the state is a legislative choice the courts should take on only if necessary. Likewise with related matters. Should the state pay for the indigent other quite essential costs, which are not provided or paid for by the state for any private litigants, such as process service

fees, or service by publication, investigative and legal services?"

Boddie v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968) A. 44, 45.

The factors to be considered certainly are not limited to those listed by the district court. At what level of income should one be allowed to proceed in forma pauperis? Appellants have limited the class to welfare recipients, but does that discriminate against other persons too poor to pay the entry and service fees? What form should the financial affidavit take? Appellants' affidavits to the Superior Court in Connecticut even fail to assert that they are entitled to redress as is necessary under the federal statute 28 U.S.C.A. 1915(a). See financial affidavits (A. 11-28). Can the State protect the financial interest of all its citizens by challenging the fact of indigency or the need for service by publication? See *Jefferies* v. *Jefferies*, 296 N.Y.S. 2d 74 (Sup. Ct., Kings Cty. 1968). Can a wife in Connecticut make a valid oath of poverty without also attesting to the poverty of her spouse in view of Conn. Gen. Stat. Sec. 46-10 which makes the husband responsible for most of the necessary expenses of his wife?

The same answers to the above questions do not apply in all situations, i.e., compare the in forma pauperis legislation found in the several states. See Amicus Curiae brief of the National Legal Aid And Defender Association, Appendix A. Colorado excludes divorce actions by men, Louisiana excludes all divorce and separation actions, Michigan requires an affidavit showing a meritorious claim, North Carolina requires proof by one or more witnesses that there is a good cause of action, etc. One necessarily concludes that each state legislature has felt the need to enact different safeguards to prevent abuse of its legislation. A legislature is best qualified to make such a local determination.

C. Connecticut is experimenting with innovative concepts as it develops in forma pauperis procedures.

The district court properly viewed the alternatives of court and legislative action when it said:

> "We should rather leave this to correction by the political process through legislative action, which may reach a *more satisfactory* result more speedily than the presently available machinery of the courts can effectively accomplish." (emphasis added)

Boddie v. *Connecticut*, Supra, A. 45

Connecticut has accepted the District Court's challenge and is attempting to solve the problem of access to her courts by the poor. The Connecticut legislature at its 1969 session considered several alternative proposals for a general in forma pauperis procedure. Although the General Assembly was unable to agree on any one of the proposals, Connecticut continues to experiment with a variety of programs to aid in the development of a comprehensive and effective program.

As an example, the State Welfare Department recently announced approval of Connecticut section 1115 demonstration project #543 "Legal Services Program". See Exhibit A attached. Through this project one hundred and fifty selected welfare families in Meriden, Connecticut will be provided the usual crisis legal services as well as the kind of ongoing consultation generally offered by a family lawyer. The program also has a unique provision allowing the client to select an attorney from two panels of lawyers. As relates to the case at bar, the three year demonstration project official summary provides, "Litigation costs will be paid by the Bar Administrator from a separate fund established for that purpose . . ." There are annual appropriations in the budget of two thousand dollars for "court costs" and for "litigation costs". See Exhibit B attached.

In addition, Connecticut has contributed funds to the very organization that represents appellants, i.e., the New Haven Legal Assistance Association, Inc. See Conn. Special Act 272 (1967). These and other funds can be and are used to pay court costs.

> "In the New Haven area, where plaintiffs reside, there is available at least to a limited degree, aid to indigent litigants through the New Haven Legal Assistance Association, Inc. Funds for the support of the Association are obtained from the United States Office of Economic Opportunity, the Ford Foundation, the Meyer Foundation and the State of Connecticut. The money available from this source for court costs, transcripts, sheriff's fees and similar purposes is limited, amounting in the period March 1, 1968 to December 31, 1968 to some $3,100.00. The executive director of the association allocates the funds available for such purposes on an evaluation of the relative importance of the individual case. Money for payment of the entry fees on appeal from the fair hearings was denied the instant plaintiffs essentially for lack of sufficient funds to cover all requests."
>
> *Frederick* v. *Schwartz,* 296 F. Supp. 1321, 1322 (D. Conn. 1969)

Connecticut's response to the District courts' challenge is hardly static. The above examples were not presented to indicate that Connecticut has solved the problem of providing legal services for the poor. The examples are indicative of an attempt through innovation and analysis to find the best possible criteria on which to base an in forma pauperis statute. The alternatives are many; proper selection is necessarily a function of the legislative process.

II.

THE GRIFFIN DOCTRINE SHOULD BE LIMITED TO CASES CONCERNING THE PERSONAL LIBERTY OF AN ACCUSED.

> **"There shall be paid to the clerks of the Supreme court or the Superior court, for each civil cause, forty-five dollars, . . ."**

Connecticut General Statute Sec. 52-259, partially quoted above, is completely neutral on its face; it was not enacted to discriminate against the indigent; nor is it applied by the State in a manner that is wilfully discriminatory. The statute requires the payment of a forty-five dollar entry fee by all persons wishing to file a civil action in the Superior Court. Appellants claim that they have been denied equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution solely because of unintentional and accidental inequality. The claim is based on the decision in *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

Griffin, after conviction in the state courts of Illinois, was denied a free transcript essential to the presentation of an appeal. The Illinois statute which required payment of a fee by all persons desiring a transcript did not violate any of the traditional tests for equal protection. See *Jefferies* v. *Jefferies,* 296 N.Y.S. 2d 74, 84 (Sup. Ct., Kings Cty. 1968). This court, nonetheless, held the Illinois statute unconstitutional based on the novel concept that even unintentional inequality violates due process.

A. There is no legal precedent to extend the Griffin Doctrine to civil litigation.

Griffin was decided on the specific facts of a criminal case. No decision of this court based on the Griffin Doctrine

has extended beyond the realm of the personal liberty of an accused. See *Burns* v. *Ohio*, 360 U.S. 252 (1959), entry fee in a criminal appeal; *Smith* v. *Bennett*, 365 U.S. 708 (1961), entry fee for habeas corpus; *Lane* v. *Brown*, 372 U.S. 477 (1962), transcript of writ of error coram nobis; *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966), transcript in habeas corpus proceeding. This court necessarily interpreted the Griffin doctrine to exclude civil matters when it denied certiorari in a case requiring the payment of certain fees as a condition precedent to defending a summary process action. *Williams* v. *Shaffer*, 385 U.S. 1037 (1967).

B. Divorce is not a right of sufficient magnitude to qualify for relief on the extraordinary grounds of the Griffin Doctrine.

No one denies that the right to life and freedom at issue in criminal cases raises questions about man's most precious right and, as such, should be afforded the greatest possible protection. But there is a scale on which the subjects of equality are ranked. *Boddie* v. *Connecticut*, supra (A. 43). Only those subjects ranked the highest are entitled to relief based on the extraordinary grounds found in Griffin; divorce does not so qualify.

The essential nature of a divorce is not consistent with the status of a fundamental right. Divorce is not an original activity, i.e., the participant's status is necessarily controlled by a precedent action *voluntarily* done. For divorce, the factor is marriage. Appellees urge that there is no constitutional right to be extracated from a predicament of one's own creation.

As for Connecticut, the State's interest is stated in *Casale* v. *Casale*, 138 Conn. 490, 492, 493:

> " 'As the State favors marriages for the reasons stated, so the State does not favor divorces; and only permits a

> divorce to be granted when those conditions are found to exist, in respect to one or the other of the named parties, which seem to the legislature to make it probable that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together.' *Dennis* v. *Dennis*, 68 Conn. 186, 197, 36 A. 34; *Morgan* v. *Morgan*, 103 Conn. 189, 195, 130 A. 254; *Andrews* v. *Andrews*, 188 U.S. 14, 30, 23 S. Ct. 237, 47 L. Ed. 366; Keezer, Marriage & Divorce (3d Ed.) § 870; 1 Nelson, Divorce & Annulment (2d Ed.) § 2.01."

Marriage and procreation have been found to be fundamental legal rights.

> *Loving* v. *Virginia*, 388 U.S. 1 (1967)
> *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)

But, one must question whether divorce has achieved that status.

> "There can be no such thing as a 'legal right' to a divorce vested in any married person."

> *Allen* v. *Allen*, 73 Conn. 54, 55 (1900)
> See also *Casale* v. *Casale*, 138 Conn. 490 (1952)

Even if the court were to elevate divorce to the position of a fundamental constitutional right, that status alone does not guarantee a person a divorce whenever he desires one. Marriage and procreation which are classified above as rights are subject to many limitations. See Conn. Gen. Stat. Sec. 46-1, 55 C.J.S. Marriages Sec. 16, 44 C.J.S. Insane Persons Sec. 71. Divorce may be similarly limited.

Whether divorce is called a "fundamental constitutional right", a "privilege" or an "original activity" it does not

present issues of a calibre similar to those concerning the life and liberty of an accused person.

C. The Griffin Doctrine is only justified in a criminal type proceeding where the state is an actual participant having an adversary interest.

The types of situations where *Griffin* is normally applied are further distinguished from divorce actions by the nature of the state's interest in each type of proceeding. In a criminal case the state has a direct interest — it is an actual participant taking an adversary position. Great abuses are possible in this situation based, in part, on the imbalance of power between the participants. The criminal defendant should be given every possible protection against the misuse of sovereign power. The Griffin Doctrine, rightfully requires that this protection be given without consideration of the wealth of the accused.

> "Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with *crime* must, as far as the law is concerned, 'stand on an equality before the bar of justice in every American court . . .'" (emphasis added)
>
> *Griffin* v. *Illinois*, 351 U.S. 12, 17

The state does have an interest in divorce proceedings. See brief of National Legal Aid and Defender Association as Amicus Curiae, App. C. It is not the interest of an adversary. The participants in a divorce proceeding are of equal status independent of the state and thus both are insulated from any abuse of sovereign power.

The District Court recognized this distinction when it said:

> "In the ordinary civil (including divorce) case the

state has no such direct participation, merely providing judicial machinery for determination of the disputes."

Boddie v. *Connecticut*, Supra. (A. 44)

The Appellees do not ask the court to limit the Griffin Doctrine merely because it always has been limited. They have enumerated differences which substantiate the past restriction and justify its continuance. The court is asked to contemplate the repercussions if protection against the unintentional discrimination proscribed in *Griffin* is extended to situations not involving the personal liberty of an accused. Would the state have to waive all fees for the indigent, e.g. marriage license, driver's license, hunting license or even road tolls? The proposition will not be fantasy if the Griffin Doctrine reaches the facts of this case.

III.

THE PREPAYMENT OF COURT ENTRY FEES REQUIRED BY CONNECTICUT GENERAL STATUTES SEC. 52-259 IS A CONSTITUTIONAL EXERCISE OF SOVEREIGN POWER.

A. The entry fees are reasonably related to legitimate state interests.

The prepayment of entry fees required by Connecticut General Statutes, Sec. 52-259, bears a reasonable relationship to legitimate state interests. *Boddie* v. *Connecticut*, Supra. (A. 44). Any resultant classification is not unconstitutional.

Rapid Transit Corp. v. *City of New York*, 303 U.S. 573 (1938)

The revenue received from entry fees is used to support the judicial system. It seems emminently fair that the cost of running a particular institution should be borne by those

who make use of the available facilities. The District Court indicated that twenty per cent of the judicial budget comes from court fees. *Boddie* v. *Connecticut*, Supra. (A. 44). Appellants assert that the figure is ten per cent. Appellees' brief p. 44 and Exhibit I. Even using the smaller figure the amount is a substantial one million five hundred thousand dollars. Clearly, waiving fees and paying notice by publication costs would create a substantial loss of revenue to the state thereby placing an excessive burden on the State's other funds.

Entry fees have the classical effect of reducing the amount of frivolous litigation. *Boddie* v. *Connecticut*, Supra. (A. 44). The State of Connecticut has a responsibility to provide for the efficient operation of its courts and to prevent their abuse. Conditioning the use of the court on the prepayment of a fee has always been used as a deterrent to ill brought litigation. Appellants urge that only the poor are prevented from bringing frivolous suits, not the wealthy. Appellants brief p. 42. It is respectfully submitted that appellants should not forget the vast middle classes who earn a moderate living and must make a financial sacrifice if they choose to bring a civil action. This large group might be the subject of discrimination if only welfare recipients are granted in forma pauperis privileges. One must not create reverse discrimination. See *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Dissenting opinion of Justice Harlan p. 35.

Appellants urge that when classifications are based on "suspect criteria" or affect "important rights", then the state must go beyond showing a rational relationship to a legitimate state interest — it must show a "compelling" state interest. Appellants brief p. 38. This principle is not applicable to the case at bar. The cited authority only relates to fact patterns where the state or city is an actual litigant — an adversary participating in the suit. *Rapid Transit Corp.* v.

City of New York, 303 U.S. 573 (1938), the validity of a city tax; *Shapiro* v. *Thompson*, 89 S. Ct. 1322 (1969), residency requirements for state welfare recipients; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), State poll tax; *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), criminal statute on mixed race cohabitation; *Hernandez* v. *Texas*, 347 U.S. 475 (1954), systematic exclusion of Mexican Americans from criminal jury panels; *Carrington* v. *Rash*, 380 U.S. 89 (1965), right of armed forces personnel to vote when they are Texas domiciliaries; *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), indigent accused later imprisoned was unconstitutionally required to pay for transcript but not indigent accused who was freed. There might be a need for more strict criteria when the state is a party and can directly affect the outcome of a case but that need does not exist in civil actions where the state does not directly participate.

Appellants list several alternate methods of limiting frivolous litigation. Appellants brief p. 43. They contend that the court should select their catalog of alternatives and eliminate entry fees. This type of selection is clearly a legislative function and the court should not interfere. (See discussion above.)

IV.

THE COURT SHOULD MAINTAIN THE TRADITIONAL CONCEPT THAT CIVIL LITIGANTS ARE RESPONSIBLE FOR THE COSTS INCIDENTAL TO BRINGING A LEGAL ACTION.

The right to or liability for costs incidental to the bringing of a legal action is statutory in nature. *Wilmot* v. *City of South Bend*, 221 Ind. 538 (1943). Traditionally, the civil litigant has been responsible for these costs.

"Costs are a part of the burden of litigation, and

no litigant is deprived of a constitutional right by statutes which impose such costs on him."

Daniel v. *Daniel*, 116 Wash. 82 (1921)
See also *Marquardt* v. *Fisher*, 135 Ore. 256 (1931)

A. Connecticut courts cannot waive payment of costs.

In asking the court for permission to avoid the responsibility of paying costs for a civil divorce action, appellants suggest that the Connecticut Superior Court might have the inherent right to waive costs. Appellants' brief p. 34. This concept has been specifically rejected in Connecticut.

". . . The clerks are accountable to the comptroller for the collection of fees required, and this court is without power to direct that they be waived."

In re Appeal of Dattilo, 135 Conn. 411, 412 (1949) Appellants concede that the ruling in Dattilo prevails in the majority of jurisdictions. Appellants' brief p. 34.

B. One sues in forma pauperis as a matter of privilege.

Since Connecticut at this time has no general in forma pauperis statute and its courts cannot waive costs of their own initiative, then appellants can only receive the requested relief if there is a *constitutional right* to litigate civil actions without the payment of costs.

The ability to proceed in forma pauperis in civil litigation has always been viewed as a privilege. *Smith* v. *Firestone Tire & Rubber Co.*, 255 F. Supp. 905 (E.D. Penn. 1966); *Bowman* v. *White*, 388 F. 2d 756 (4th Cir. 1968); *U. S.* v. *Madden*, 352 F. 2d 795 (9th Cir. 1965).

The most liberal statute authorizing in forma pauperis procedures itself contains limitations that are inconsistent with rights of constitutional magnitude.

> "(a) . . . An Appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. . . .
>
> (d) the court may . . . dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C.A. Sec. 1915

A constitutional right cannot be diluted by the precondition that a judge must approve the claim's fundamental merit in some way before the right may be exercised as is required by 28 U.S.C.A. 1915. Can the court envision a judge being required to determine whether an accused will be injured by the absence of an attorney before a Miranda warning must be given? The distinction comes into focus when one views an excerpt from the decision in a civil action for damages reported as *Smith* v. *Firestone Tire & Rubber Co.*, 255 F. Supp. 905 (E.D. Penn. 1966), at p. 907.

> "To choose between the pejoratives 'not in good faith'; 'frivolous' — and the quite opposite characterization: 'presents a substantial question', would be to make an artificial and inaccurate choice.
>
> It seems more reasonable, in the present instance, to say that the court has analyzed the points asserted on appeal, as well as the asserted hardships, in the light of the nature of the case — and in the exercise of discretion has determined that the appeal should not be allowed in forma pauperis. Influencing that decision, but not controlling it, is the opinion of this Court that the plaintiff is not likely to succeed on appeal. 28 U.S.C.A. § 753(f). As was said in Smart v. Heinze, 347 F. 2d 114, 116 (9th Cir. 1965):

'To proceed *in forma pauperis* is a privilege not a right. Clough v. Hunter, 191 F. 2d 516 (10th Cir. 1951). It is the duty of the District Court to examine any application for leave to proceed *in forma pauperis* to determine whether the proposed proceeding has merit and if it appears that the proceeding is without merit, the court is bound to deny a motion seeking leave to proceed *in forma pauperis*. Tate v. People, et al., 187 F. 2d 98 (9th Cir. 1951); Huffman v. Smith, 172 F. 2d 129 (9th Cir. 1949); Meek v. City of Sacramento, 132 F. Supp. 546 (N.D. Cal. 1955). . . .' "

The difference is obvious and compelling — Congress has never considered civil in forma pauperis actions to be constitutionally compelled.

Another bar to the finding of a constitutional mandate for appellants' claim lies in the very nature of the relief sought, i.e., not only must the state waive the statutory entry fees due the court but the state must also make arrangements for service of original process. See Complaint (A. 9, 10). The claim is unique — only once has a court gone so far as to declare that auxiliary expenses (those payable by litigants to third persons other than public officials) necessary to the effective prosecution of a divorce action must, of constitutional necessity, be paid by the state. *Jefferies* v. *Jefferies*, 296 N.Y.S. 2d 74 (Sup. Ct., Kings Cty., 1968). Note that the Supreme Court of New York is not the highest court of that state.

The *Jefferies case* is distinguishable from the case at bar. In New York a general in forma pauperis statute existed at the time *Jefferies* was being decided. This indicated a legislative intent not yet expressed in Connecticut. That statute provided a source for funds to pay costs similar to auxiliary expenses. *Jefferies* v. *Jefferies*, Supra, p. 88. Connecticut has made no appropriation for this type of expenditure. Note-

worthy exception are funds for the legal services demonstration project and the New Haven Legal Assistance Association, Inc. mentioned above. The state's funds cannot be used for purposes other than those for which they have been appropriated.

Dellaripa's Appeal, 88 Conn. 565, 569 (1914)

In *Jefferies,* p. 90, Supra, the court held that the State of New York may challenge the need for service by publication as well as the fact of indigency. One can only speculate as to the result if the State of Connecticut were allowed to challenge the type of service as well as the indigency of the Appellants: Nine persons were listed as the named plaintiffs in the caption of the complaint filed in the District Court on April 20, 1968. See Complaint, (A. 8). Catharine Strain withdrew from the appeal in this court for unknown reasons. See Notice of Appeal, (A. 48). Of the remaining plaintiffs, Betty Ann Perez already has a divorce action pending, Docket No. 117654 F.R., in the Connecticut Superior Court for New Haven County. See letter attached as Appellees' Exhibit C. Bertha Baker favorably settled a negligence action, Docket No. 97526, on September 28, 1967 only five months before signing an affidavit of poverty. See Exhibit C and Affidavit (A. 23). Appellees know of only four financial affidavits having been filed with this court: Mary R. Yeaton, Gladys G. Boddie, Mary Wierzbicki and Mary Ann Dozier. These facts raise serious doubts about the appellants' inability to gain access to the State Courts because of indigency. The New York procedure outlined in *Jefferies* v. *Jefferies,* Supra, provides a means for resolving these doubts — Connecticut obviously lacks the necessary safeguards to challenge indigency or the need for publication.

The legal basis for the New York court's conclusion in the Jefferies case was an extension of the Griffin Doctrine to include civil matters. This concept has been disclaimed above.

Appellees respectfully submit that the *Jefferies case* does not provide a result appropriate for general application.

V.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ONLY PROTECTS RIGHTS THAT ARE CONSTITUTIONALLY GUARANTEED.

Appellants claim that they are unconstitutionally denied due process of law by the imposition of the entry fee required by Conn. Gen. Stat., Sec. 52-259. See Complaint (A. 9). They assert that there is an all-encompassing First Amendment right to petition the court for redress of grievances and this right is guaranteed by the State through the due process clause of the Fourteenth Amendment to the United States Constitution as interpreted in *Button* v. *NAACP*, 371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964) and *United Mine Workers of A. Dist.* 12 v. *Illinois State Bar Association*, 389 U.S. 217 (1967). Appellants' brief p. 26-37.

A. Divorce is not a constitutionally guaranteed right.

Appellants' position is untenable. *Button, Trainmen* and *Mine Workers* are cases where organizations in various ways provided legal counsel to be used by individual members in prosecuting their personal legal claims. The court had to consider statutes which completely eliminated an activity, i.e., the provision for legal services by a group. Essential to each decision is the court's determination that group assembly to provide legal services is an undeniable element of due process. But divorce can only be granted by statutory authority. *Steele* v. *Steele*, 35 Conn. 48, 54 (1868). Since one legislature is not bound by the actions of a preceding legislature,

the state could completely eliminate divorce procedures if it so desired. *Patterson* v. *Dempsey,* 152 Conn. 431, 439 (1965). Therefore, divorce cannot be an essential element of due process. Also, the present case is devoid of the question of group rights as found in *Button, Trainmen,* and *Mine Workers.*

Once a state, in fact, grants a statutory procedure for obtaining a divorce, its citizens can only claim that the statutory right is being applied in a discriminatory fashion. Very little discrimination is so unjustifiable that it violates due process. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Indeed, appellants concede that their due process argument is not meant to consider unequal application of the provisions of Conn. Gen. Stat., Sec. 52-259. Appellants' brief p. 29. The claimed violation of due process is, therefore, groundless.

CONCLUSION

Appellants are welfare recipients who claim that they are prevented from prosecuting their claims for divorce because they cannot afford the fees required by the laws of Connecticut. The proposition compels empathy.

The provision of legal services for the poor is a need of great social moment but appellants have sought redress before the wrong body. Resolution of this problem requires legislative action. Courts cannot legislate merely because they believe what the legislature has done is unwise or unsympathetic to the problems of a particular group.

To justify judicial legislation appellants have asked the court to extend legal precedents beyond their logical limitations. These extensions range from applying the Griffin Doctrine to cases not involving the personal liberty of an accused to a claim that Due Process clause limitations must apply to the statutory right of divorce. To enter the legislative sphere,

the court would have the dubious task of accepting *all* of the appellants' proposals.

The court should affirm the decision of the three-judge District Court which granted Appellees' motion to dismiss.

> "Although with some hesitation, we conclude that the court should not, by resort to the Constitutional guarantees which for 100 years have been considered not to demand such state action, attempt to speed up the amelioration of the lot of the indigent by forcing the state to provide free access to the civil courts without payment of a relatively modest fee. We should rather leave this to correction by the political process through legislative action, which may reach a more satisfactory result more speedily than the presently available machinery of the courts can effectively accomplish."

Boddie v. *Connecticut*, supra. (A. 45)

Respectfully submitted,

ROBERT K. KILLIAN
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Of Counsel:

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Certificate of Service

I, Raymond J. Cannon, attorney for the appellees, certify that on the thirtieth day of September, 1969, I served a copy of the foregoing Brief on the appellants by mailing air mail, postage prepaid, to the following attorneys of record:

ARTHUR B. LAFRANCE, ESQ.
New Haven Legal Assistance Association
College of Law
Arizona State University
Tempe, Arizona 85281

ALLAN ASHMAN
BETTIE MCJUNKIN
1155 E. 60th Street
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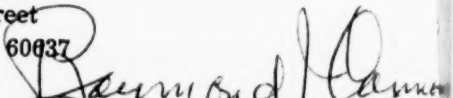

RAYMOND J. CANNON
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

EXHIBIT A

DEPARTMENT OF HEALTH, EDUCATION & WELFARE
Social and Rehabilitation Service
Washington, D.C. 20201

July 8, 1969

Mr. Bernard Shapiro
Commissioner
State Welfare Department
1000 Asylum Avenue
Hartford, Connecticut 06115

Dear Mr. Shapiro:

This will confirm our telegram that the Connecticut section 1115 demonstration project #543 "Legal Services Program," has been approved. The total approved budget is $119,974, of which $32,483 is a grant from special Federal project funds. Approval is conditional on a consultation visit from the Regional and Central Office staff in the near future for the development of the evaluation plan, and on submission of the drafts of the three contracts to central office for review before they are let.

The first progress report on this project is due no later than May 1, 1969, and should accompany the request for continuation for the second year.

We are sending you under separate cover a supply of Form FS 142.7 Schedule P, and instructions for submitting reports on demonstration expenditures with the regular quarterly expenditure statement in order that you may claim addi-

tional Federal funds up to the limits specified above.

Sincerely yours,

James F. Garrett
Assistant Administrator
Research, Demonstrations and Training

Enclosures

7-11-69

cc. Mr. Harder
Mr. Bauer
Mr. Tevald

EXHIBIT B

Excerpt from Budget for demonstration project
NO. 543 "Legal Services Program"
ATTACHED LIST #3

OTHER EXPENDITURES	Total Cost	Regular Federal Share	S.F.P. Funds
25 Panel Lawyers (average 3 clients @ 30 hrs. ea. @ rate of $16. per hour, total of 2250 hours)			
ADC	32,400.00	24,300.00	8,100.00
Adult categories	3,600.00	1,800.00	1,800.00
Rental & maintenance of office space 800 sq. ft. @ $4.00 per sq. ft. per one year and $.50 per sq. ft. for maintenance	3,600.00	2,700.00	900.00
LEGAL EXPENSES: Court costs	1,000.00	750.00	250.00
Reserve fund for law students and cases with waiver of 30 hr. limitation	7,100.00	5,325.00	1,775.00
Bar Administrator	4,500.00	3,375.00	1,125.00
Litigation Costs	1,000.00	750.00	250.00
Bonding & insurance	350.00	262.50	87.50
Law library & publications	2,000.00	1,500.00	500.00
OFFICE EXPENSES: Rental of copier	500.00	375.00	125.00
Accounting	300.00	225.00	75.00
Telephone	1,000.00	750.00	250.00
Postage	200.00	150.00	50.00
Evaluation of Project	8,000.00	6,000.00	2,000.00
Staff Training & Conferences	4,000.00	3,000.00	1,000.00
	69,550.00	51,262.50	18,287.50

EXHIBIT C

STATE OF CONNECTICUT

Supreme Court

AND

Superior Court

IN AND FOR NEW HAVEN COUNTY

EDWARD HORWITZ, CLERK
ASSISTANT CLERKS
VINCENT J. FASANO
LEONARD J. GILHULY
LOUIS P. HURLEY, JR.
HAROLD J. IVEY
JOHN J. MANNION

CLERK'S OFFICE, NEW HAVEN

July 7, 1969

Raymond J. Cannon
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut

Dear Mr. Cannon:

In reply to your letter of July 7, 1969, please be advised that we have checked our records concerning the persons mentioned in said letter and have found the following:

No. 117654 F. R. Betty A. Perez of New Haven vs. Louis A. Perez, a divorce action, returnable first Tuesday in August, 1968.

No. 97526, Cecil Livingston and Bertha Barker, both of New Haven vs. Edward E. Borsoi, a negligence case, returnable first Tuesday of November, 1961, which was settled on September 28, 1967 and withdrawn on October 27, 1967.

Very truly yours,

EDWARD HORWITZ
Clerk of Superior Court

EH/pr